(1) Supreme Court, U.S.

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No. _____ OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

ROBERT A. HIRSCHFELD
Petitioner
v.
ALFRED ROGERS, Judge, Maricopa County Arizona Superior Court, in his personal capacity;
CAROLYN ROGERS, his wife;
KENNETH L. FIELDS, Former Domestic Relations Presiding Judge, Maricopa County Arizona Superior Court, in his personal and administrative capacity; and
ANDREA FIELDS, his wife
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT, U.S.

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September 8, 1998

56 pp

QUESTIONS PRESENTED

1. Is a state court judge, who has been individually divested of all jurisdiction over a case by virtue of being affirmatively disqualified, who refuses to acknowledge his own divestment, and thereafter commits unconstitutional torts solely under color of the case in which he knows, or should know, that he has lost all jurisdiction, subject to 42 U.S.C. §1981-88 liability?

If certiorari is granted, Petitioner would also seek to determine a subsidiary question regarding Respondent Fields:

2. Is a state court presiding judge, who commits unconstitutional torts solely in his administrative capacity, furthering the misconduct of another non-immune judge and both a judgment and an arrest warrant entered without jurisdiction by that other judge, subject to 42 U.S.C. §1981-88 liability?

LIST OF PARTIES

Petitioner hereby abandons defendant parties other than named Respondents. Review is sought solely with respect to Respondents Rogers and Fields, and their spouses. Defendant Martin LaPrade is abandoned.

Justices of the U.S. Supreme Court may wish to take judicial notice that Defendant Judges Rogers and Fields are both currently sitting judges of the Superior Court, Maricopa County, Arizona, and are members of the State Bar of Arizona.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 11, 1998.

OPINIONS BELOW

The memorandum Opinion of the Court of Appeals (unpublished) and the Order of the District Court for the District of Arizona (unpublished) and the Order on Reconsideration of the District Court (unpublished), appear in the appendix hereto, as Appendices A, B and C respectively.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 11, 1998. This petition for certiorari is being filed within 90 days of that date. Jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The federal Civil Rights case was brought under 42 U.S.C. §§ 1981-88. None of the statutory language is at issue; rather the judge-made policy of judicial immunity is sought to be shown inapplicable to circumstances where a judge is affirmatively divested of all jurisdiction in a state case, and thereafter without authority commits 42 U.S.C. §§ 1981-88 cognizable acts.

Arizona Rule of Civil Procedure 42(f)1,[1] effective 12/1/90, was invoked to peremptorily disqualify and

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[1] Between 12/1/90 and the 12/1/96 effective date of the current language, the waiver provision (material to this action), stated:
(D) Waiver. A party waives the right to change of judge as a matter of right when, after a judge is assigned to preside at trial or is otherwise permanently assigned to the action, the party agrees to the assignment or participates before that judge in:
i) Any scheduled contested matter in the case; or
ii) A scheduled pretrial hearing or conference; or
iii) The commencement of a trial.
Such waiver is to apply only to such assigned judge

completely divest Respondent Judge Alfred Rogers of jurisdiction before any of the complained-of acts, is set forth as Appendix D, as it existed at all times material hereto.

Apparently in belated reaction to the circumstances of the *Taliaferro* state court matter, the Arizona Supreme Court subsequently amended portions of A.R.C.P. Rule 42(f)(1) to eliminate the element of party participation, which is arguably the crux of Defendant Alfred Rogers having been completely deprived of all jurisdiction. Said subsequent amendment does not affect the effectiveness of Rogers' prior disqualification, but is reproduced in the footnote below, as probative of the Arizona Supreme Court's tacit recognition that Judge Rogers was effectively disqualified under the 1990 version of the rule. [2]

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[2] The Arizona Supreme Court, arguably as a result of the fact that Judge Alfred Rogers in 1993 was stripped of his jurisdiction under the circumstances of this case, amended the waiver section of ARCP Rule 42(f)(1)(D), to eliminate the "*participation before that judge*" element, effective 12/1/96:

(D) Waiver. After a judge is assigned to preside at trial or is otherwise permanently assigned to the action, a party waives the right to change of that judge as a matter of right when:
(I) the party agrees to the assignment
(ii) after notice to the parties,
(aa) the judge rules on any contested issue,
(bb) the judge grants or denies a motion to dispose of one or more claims or defenses in the action;
(cc) the judge holds a scheduled conference or contested hearing; or
(dd) trial commences.
Such waiver is to apply only to such assigned judge.

STATEMENT OF THE CASE

Prior to the events giving rise to his Federal Civil Rights Complaint, Petitioner Robert A. Hirschfeld, JD, became the third attorney of record in Clint Taliaferro's Maricopa County, Arizona divorce. Several days before Mr. Taliaferro hired Hirschfeld, the divorce case was reassigned to Defendant Judge Alfred Rogers, who had a reputation for consistently denying child custody to fathers.

Hirschfeld's first litigative act was to timely exercise his client's peremptory Notice of Change of Judge pursuant to Arizona Rule of Civil Procedure 42(f)(1). Rogers wrongfully refused to comply with the requirement that he transfer the case, compelled the Taliaferros to continue through a hotly contested 1993 trial, and, among other things, sanctioned Attorney Hirschfeld with a judgment of $20,000 for purported discovery violation. Said judgment has twice, and finally, been stricken by the Arizona Court of Appeals, first because Rogers had no jurisdiction to proceed after he was disqualified [3], and later, abuse of discretion.[4]

During *Taliaferro's* Appeal, the jurisdictionally stripped Rogers used contempt and incarceration in the appealed case, to extort payment of the $20,000 money judgment.

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[3] *Taliaferro v. Taliaferro*, 184 Ariz. 613, 911 P.2d 619 (App. 1995)

[4] *Taliaferro v. Taliaferro*, 188 Ariz. 333, 935 P.2d 911 (App. 1996)

The Federal case does not seek relief from the money judgment, nor for misconduct prior to the events surrounding the May 1994 wrongful issuance of the post-divorce warrant for the arrest of Attorney Hirschfeld.[5]

This case arises from the 42 U.S.C. 1983 cognizable, jurisdictionally void civil arrest of Petitioner, a then-practicing Arizona Attorney, on order of Defendant Arizona

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[5] **The following public-record, significant, chronology may be noted:**
2/24/93 Notice of Change of Judge against Alfred Rogers (*Taliaferro*)
3/6/93 $20,000 fine imposed by Rogers at end of trial (*Taliaferro*)
9/24/93 Notice of Appeal to Ariz. Court of Appeals (*Taliaferro*)
3/7/94 Hirschfeld files Opening Brief in State Appeal (*Taliaferro. App*)
3/11/94 Rogers' first arrest warrant for Hirschfeld (quashed) (*Taliaferro*)
4/4/94 Rogers' second arrest warrant for Hirschfeld (*Taliaferro*)
5/5/94 Hirschfeld arrested, incarcerated for 30 hours; (*Taliaferro*)
5/94 Hirschfeld placed on Bar Probation because of arrest publicity
6/7/95 Hirschfeld Suspended from Bar, believed to partly result from continuing machinations by Defendants Rogers and Fields
8/6/95 Hirschfeld files 1st. Federal Complaint *CIV 95-1612 PHX EHC*
10/17/95 Rogers found to have been divested of jurisdiction, divorce decree set aside and the $20,000 sanction vacated: (*Taliaferro App.*) *Taliaferro v. Taliaferro*, 184 Ariz. 613, 911 P.2d 619 (App. 1995)
11/95 Disbarment proceedings begun in earnest; believed to partly result from continuing machinations by Defendants Rogers and Fields
6/20/96 Arizona Supreme Court vacates *Taliaferro* Court of Appeals decision on laches grounds; within days, Defendants Rogers and Fields file copy in Federal District Court claiming absolute judicial immunity. *Taliaferro v. Taliaferro*, 186 Ariz. 221, 921 P.2d 21 (1996)
10/3/96 Initial dismissal of Federal case *CIV 95-1612 PHX EHC*
11/19/96 Arizona Court of Appeals for the second time vacates the $20,000 sanction in *Taliaferro v. Taliaferro*, 188 Ariz. 333, 935 P.2d 911 (App. 1996)
9/30/97 Dismissal after reconsideration of *CIV 95-1612 PHX EHC*
10/3/97 Hirschfeld files Notice of Appeal to *9th. Circuit, #97-16957*
6/11/98 Dismissal affirmed, *9th. Circuit, #97-16957*; ninety day period to file this U.S. Supreme Court Petition for Certiorari begins
7/28/98 Hirschfeld disbarred by Arizona Supreme Court. believed to partly result from continuing tactical machinations by Rogers and Fields.

Superior Court Judge Alfred Rogers, who knew at the time that he had (a year before) been lawfully divested of all jurisdiction regarding the case in which the arrest warrant was issued, Rogers and co-defendant, administrative presiding judge Fields, have thus far evaded liability based upon mistaken "absolute judicial immunity".

REASONS FOR GRANTING THE WRIT

JURISDICTIONALLY VOID IMMUNIZATION OF A JUDICIAL MISCREANT OFFENDS INTEGRITY OF ALL AMERICAN JURISTS AND REDUCES PUBLIC TRUST IN OUR JUDICIARY

Supreme Court precedent requires two prongs to independently apply, for a state court judge to enjoy absolute judicial immunity against liability for his otherwise actionable torts committed under color of his judicial authority:

1. The tortious act must be of a judicial nature and
2. The tortious act must not have been done in complete absence of jurisdiction.

Mireles v. Waco, 112 S.Ct. 286 (1991), *Stump v. Sparkman*, 435 U.S. 349 (1978), *Crooks v. Maynard*, 913 F.2d 699 (9th Cir. 1990).

This Petition involves a situation in which the first immunity-prong applies, but the second does not

Personal liability of a non-immune judge, for acts taken in complete absence of jurisdiction, should not chill fearless, independent adjudication in other, jurisdictionally sound cases. Rather, it should warn that there are jurisdictional bounds beyond which no judge may act with impunity.

Fearless adjudication relies upon the adjudicator's reasonable expectation of immunity. But when a judge knows that he lacks all jurisdiction, there is no such expectation

The integrity of the entire American Judicial System, and respect for that system, rests upon the public expectation that judges act within the bounds of their jurisdiction, and that miscreant, renegade, judges who defy those bounds be permitted no greater immunity from personal liability than any other citizen.

Mireles v. Waco, 112 S.Ct. 286 (1991) posits that a State Superior Court judge has "general jurisdiction", so broad and undefined that virtually everything not expressly prohibited to him, falls within his jurisdiction.

Yet, Arizona, Alaska, Nevada, Wyoming and probably other states permit peremptory disqualification. Under prevailing case law of each such state, the disqualified judge is affirmatively, and completely divested of jurisdiction in the action from which he was disqualified, including such "general jurisdiction" as might apply to that case. Should he refuse to honor the divestment, and thereafter commit 42 U.S.C. § 1983 cognizable torts under color of that action "in complete absence of all subject matter jurisdiction", he cannot enjoy "absolute judicial immunity," even though he meets the first prong, by acting in a judicial manner[6]

That situation exists here.

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[6] *Hordyk v. Farley*, 94 Ariz. 189, 382 P.2d 668 (1963); *Morgan v. Alaska*, n.11, 635 P.2d 472 (1981); *Nevada v. Loehrer*, 948 P.2d 261 (Nev. 1997); *Pawlowski v. Pawlowski*, 925 P.2d 240 (Wyo. 1996)

Arizona Rule of Civil Procedure 42(f)(1) provides a peremptory right of change of judge which completely divests a Superior Court Judge having general jurisdiction, of his subject matter jurisdiction over the particular case in which ARCP Rule 42(f)(1) is properly invoked against him.[7]

The U.S. District Court for the District of Arizona dismissed the 42 U.S.C. 1983 action against Defendant/ Respondent Alfred Rogers. It wrongfully assumed that jurisdiction-related dictum in the Arizona Supreme Court ruling, *Taliaferro v. Taliaferro*, 186 Ariz. 221, 921 P.2d 21 (1996) referred not only to the subject matter jurisdiction of the institution of the Superior Court but to that of an individual judge lawfully disqualified in a particular case, in which he nevertheless continued to act.

The Arizona Supreme Court in *Taliaferro*, id., correctly opined that the institution of the Superior Court continuously retains its legislatively or state-constitutionally granted subject matter jurisdiction, through which successor judges lawfully act.[8]

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[7] "Because Judge Rogers had no jurisdiction to proceed after husband's notice was filed, we vacate all rulings and orders made by him after February 24, 1993, including the decree of dissolution of marriage between husband and wife, and the $20,000 order of sanctions against attorney Hirschfeld." *Taliaferro v. Taliaferro*, 184 Ariz. 613, 911 P.2d 619 (App. 1995) *Also see Hordyk v. Farley*, 94 Ariz. 189, 382 P.2d 668 (1963).

[8] "Article 6, Section 14(9) of the Arizona Constitution vests original *jurisdiction of a divorce proceeding in the superior court*. This court could not, under its rule making power, detract from the constitutional grant of jurisdiction. Whatever the effect of an erroneous failure to honor a notice of change of judge, it cannot shrink the subject matter jurisdiction *of that court* to hear and determine the proceeding before it." (emphasis supplied) *Taliaferro v. Taliaferro*, 186 Ariz. 221, 921 P.2d 21 (Ariz. Supreme Ct. 1996, vacating *Taliaferro*, id. 184 Ariz. 613 on *appellate laches* , not individual-judge-jurisdiction grounds)

Unlike the institution of the Superior Court, a disqualified, jurisdictionally divested individual judge who persists, in the guise of exercising his non-existent jurisdiction, in committing post-divestment 42 USC 1983 cognizable torts, should merit no immunity.

The District Court further stated in its dismissal decision (Appendix B):

"Even if Plaintiff's contentions had merit and Judge Rogers lacked subject matter jurisdiction in *Taliaferro*, that is not sufficient to defeat absolute immunity."

Clearly, lack of subject matter jurisdiction, alone, regardless of the nature of a "judicial act" is sufficient to defeat absolute judicial immunity. The two immunity prongs of *Stump v. Sparkman*, id., 435 U.S. 349 (1978) are conjunctive. Immunity requires both prongs.

In affirming dismissal of Petitioner's Civil Rights federal suit, the Ninth Circuit Court of Appeals also ignored distinctions between the institution of the court and an individual judge. The decision from which Certiorari is hereby sought, cited only one case, regarding absolute judicial immunity: the inapposite *Crooks v. Maynard*, 913 F.2d 699 (9th Cir. 1990),[9] wherein there was never any question as to Judge Maynard's lawful exercise of his subject matter jurisdiction.

The difference between selectively disabling a judge in various aspects of adjudication (such as during the

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[9] Finding Maynard's acts to be of a judicial nature, the Court stated,"Judge Maynard would be protected by absolute immunity for any contempt citation, so long as his contempt order was not issued in the clear absence of all jurisdiction." *Crooks v. Maynard, id.*, 913 F.2d 699,700, n.1 |(9th Cir. 1990)

appellate period) and the permanent extinguishment of his jurisdiction by peremptory disqualification as of right, in a given case, has a logical relevance to a Judge's expectation of enjoying absolute judicial immunity in that case.

In examining § 1983 entitlement to absolute judicial immunity, all existing precedent focuses first upon the nature of the act: is it an act ordinarily performed by a Judge? Unfortunately, judges sometimes exceed their jurisdiction in a particular case. But an act done in complete absence of all jurisdiction cannot be a judicial act., *Piper v. Pearson* 2 Gray 120. It is no more than the act of a private citizen, pretending to have judicial power, which does not exist at all. In such circumstances, to grant absolute judicial immunity is contrary to the public policy expectation that there shall be a Rule of Law. Alfred Rogers, who was completely divested of jurisdiction, is liable as a private citizen.

The Arizona Supreme Court, brushed aside the 1995 Court of Appeals *Taliaferro* decision on the basis of *laches*, [10] but could not retroactively create subject matter

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[10] "Once judgment has been entered in a civil action, it is too late in the day to be worrying about who tried the case, short of true challenges for cause under Rule 42(f)(2). In short, if we are to have a peremptory challenge to a judge, then we must have a system in which the opportunity to review a ruling on the propriety of a notice occurs before the judge presides over the case much further. Special action relief, unlike an appeal, of course, is discretionary. But, in our view, that is all a party is entitled to on a rule-driven "matter of grace" (Citation).
"Here, months after the trial court denied husband's notice of change of judge, the case went to trial. Husband never sought special action relief, and therefore he cannot now raise on appeal error in connection with the dishonor of his notice of change of judge.
The rule we adopt today will encourage parties to ensure that their notices are timely and that there has not been waiver. More importantly, it will require parties to seek immediate judicial review or forever hold their peace." *Taliaferro v. Taliaferro*, 186 Ariz. 221, 921 P.2d 21 (Ariz. 6/20/96)

jurisdiction capable of being wielded by a lawfully disqualified individual judge after it had been extinguished under existing State Law. *Ex Parte McCardle*, 6 Wall. 318 (1868); 7 Wall. 506 (1869); *accord, Hordyk v. Farley*, 94 Ariz. 189, 382 P.2 668 (1963).

The threshold question of state court subject matter jurisdiction cannot be brushed away, as did the Arizona Supreme Court, because "... it is too late in the day to be worrying about who tried the case..." A Federal District Court is not bound to accept the state's highest court's evasive dictum regarding survival of *"the court's subject matter jurisdiction"* as dispositive of whether *the individual disqualified judge* has been stripped of his subject matter jurisdiction over a particular case in which he later claims absolute judicial immunity.[11] The Arizona Supreme Court in *Taliaferro* could not, for purposes of challenging a judge's subject matter jurisdiction, on post-judgment appeal as of right, overturn the principle in *Huck v. Haralambie*, 122 Ariz. 66, 593 P.2d 289 (Ariz, App. 1978). (Judgment set aside upon finding that the judge was in fact acting in absence of all jurisdiction by virtue of a proper, timely A.R.C.P. Rule 42(f)(1) Notice of Change of Judge.)

"Since the court remains the same regardless in a change in the person of the judge, it is generally held that the jurisdiction, powers, and duties of the departing judge fall upon his successor. George or Edward may pass, but `The King' lives forever. *Raugh v. School*, 19 Wash. 30, 52 Pac. 332; *In re Day's Estate*, 129 Kan. 14, 281 Pac. 865; *Hoffman v. Shuey*, 223 Ky. 70, 2 S.W. (2d) 1049, 58 A.L.R. 842" *Chiricahua Ranches Co. v. Arizona*, 44 Ariz. 559, 39 P.2d. 640 (1934)

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[11] The Arizona Supreme Court was silent as to individual-judge loss of jurisdiction. It thereby let stand the Court of Appeals finding that Rogers himself was divested of jurisdiction.

"Jurisdiction of the subject matter is derived from the law. It can neither be waived nor conferred by consent of the accused. Objection that the court does not have jurisdiction of the subject matter may be made at any stage of the proceedings, and the right to make such objection is never waived. Citing: 21 *Am.Jur.*2d Criminal Law §379 (1965)" *Morgan v. Alaska*, id., n.11, 635 P.2d 472 (1981)

Arguably, the Arizona Supreme Court's 6/20/96 stated refusal to allow post-trial assertion, in an appeal as of right, that a judge has been completely divested of subject matter jurisdiction, violates this long-standing principle.[12] The dictum in that highest-state-court's Taliaferro decision carefully avoids referring to Judge Rogers' subject matter jurisdiction, and instead correctly comments that a peremptory change of judge does not affect the subject-matter jurisdiction of the institution of the Superior Court, granted by the legislature.[13]

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[12] "One of the hoariest precepts in our federal judicial system is that a claim going to a court's subject-matter jurisdiction may be raised at any point in the litigation by any party." Dissent, Justice Scalia, *Peretz v. U.S.*, 501 U.S. 923, 953 (1991);
See also: "It is true, of course, that a litigant's prior agreement to a judge's expressed intention to disregard a structural limitation upon his power cannot have any legitimating effect -- i.e., cannot render that disregard lawful. Even if both litigants not only agree to, but themselves propose, such a course, the judge must tell them no. ..... Such an error may be raised by a party, and indeed must be noticed *sua sponte* by a court at all points in the litigation (citations) ..... Since a jurisdictional defect deprives not only the initial court but also the appellate court of its power over the case or controversy, to permit the appellate court to ignore it because of waiver would be to give the waiver legitimating, as opposed to merely remedial, effect, i.e., the effect of approving, *ex ante*, unlawful action by the appellate court itself. " Concurrence, Justice Scalia,, joined by Justices O'Connor, Kennedy and Souter, *Freytag v. Comm. Of Internal Revenue*, 501 U.S. 868, 896 (1991)

[13] *Taliaferro v. Taliaferro*, 186 Ariz. 221, 921 P.2d 21 (Ariz. 6/20/96)

"Although a valid peremptory challenge does negate the authority of a particular judge to preside over a particular case, it affects neither the personal nor the subject matter jurisdiction of the court; another judge of the same court may exercise both types of jurisdiction unaffected by the challenge." *Morgan v. Alaska*, id, 635 P.2d 472 (1981)

Superior Court Judges are broadly vested with "general jurisdiction." Evidently, this means that even if a case involving a particular attorney is not assigned to him, a judge may reach out into the hallway, ordering his deputy to use "excessive force" to haul the attorney into the courtroom for chastisement or even incarceration. *Mireles v. Waco*, id., 112 S.Ct. 286 at 288 (1991). Arguably, anything goes, in a Superior Court Judge's exercise of his "general jurisdiction", with the judge enjoying "absolute judicial immunity" against tort consequences. In *Stump v. Sparkman*, 435 U.S. 349, 55 L.Ed. 2d 331, 98 S.Ct. 1099 (1978), a judge was deemed absolutely immune for an outrageous act authorizing involuntary sterilization of a minor, because he had "general jurisdiction" and the act was not expressly prohibited by law.

But in this case, there was a properly invoked procedural rule which permanently extinguished all of Alfred Rogers' existing jurisdiction, general or not, in the *Taliaferro* matter, Maricopa County, Arizona, Superior Court Action DR92-07715. Defendant Rogers expressly based his tortious actions, including Petitioner Hirschfeld's DR92-07715 captioned arrest warrant, upon his wrongfully claimed continuing jurisdiction in that matter.

In the circumstances alleged, operation of Rule 42(f)(1), Arizona Rules of Civil Procedure on 2/24/93, irreversibly and affirmatively divested Alfred Rogers, in Action DR92-07715 of subject matter and in-personam jurisdiction. In the spring of 1994, after entry of the "Final Decree of Dissolution", while the matter was on Appeal,

there existed no lawful basis for further decision, ruling, or order, whether temporary or not, within the official power of Alfred Rogers. But the disqualified Rogers obstinately refused to loosen his death-grip upon the case until he was routinely rotated off of the Domestic Relations bench later that year.

There is no comparable procedural nor jurisdictional situation in *Stump v. Sparkman*, id., *Mireles v. Waco*, id., nor, apparently, in any other judicial immunity case. None of the line of §1983 District, Circuit, or Supreme Court "immunity" cases deals with a procedural rule which, when properly invoked, affirmatively and irreversibly strips from a judge his existing jurisdiction.

Such peremptory divestiture mechanism has no parallel in Federal Rules of Civil Procedure, from which the Arizona Rules of Civil Procedure were derived. Arizona's rules were deliberately amended to include Rule 42(f)(1), which upon filing of a timely, non-waived, peremptory Notice of Change of Judge, operates immediately to divest the "Noticed" judge of jurisdiction over the subject matter and parties of the case.

The peremptorily "Noticed Judge" has a ministerial duty to expeditiously transfer the case, and the file, to the presiding judge for reassignment. In February 1993, Defendant Alfred Rogers made a legally unfounded pronouncement on the record, claiming that he did not have to honor the Notice. Rogers knew, or should have known, as early as 2/24/93, from a simple reading of the unmistakably stated elements of waiver in the 1993-effective Arizona Rule of Civil Procedure 42(f)(1)(D), that one essential element of waiver (participation by the party invoking the rule), was missing. The peremptory notice was facially valid.

ADMINISTRATOR FIELDS LACKS IMMUNITY

On reconsideration, the District Court agreed that Judge Fields was not immune, because his acts were alleged to be entirely administrative. (Appendix C) The District Court then dismissed Fields on an alternative ground, which Petitioner argued against on appeal. However, the Court of Appeals for the Ninth Circuit failed to rule on said alternative ground, and instead ruled without further explanation, that both Judges were "absolutely immune". Should certiorari be granted, Petitioner would seek leave to argue the subsidiary issue of Fields' non-immunity; the undecided appellate arguments against the "alternative ground" could be remanded to the Ninth Circuit, or back to the District Court.

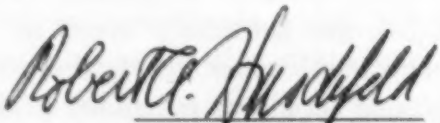
Immunity of Alfred Rogers, *arguendo*, would not immunize a fellow judge, whose tortious acts are committed solely in an administrative capacity. Torts attributed to Presiding Judge Fields' did not involve the "performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights." See: *Forrester v. White*, 484 U.S. 219, 98 L.Ed.2d 555, 108 S.Ct. 538 (1988); *Atkinson-Baker & Assoc. v. Kolts*, 7 F.3d 1452 at 1454, (9th Cir. 1993); *Stump v. Sparkman*, 435 U.S. at 380, 98 S.Ct. at 1106. *Mireles v. Waco*, 112 S.Ct. 286 at 288 (1991).

Fields is alleged among other things, to have promoted through public postings, the actual arrest and incarceration of Petitioner Attorney Hirschfeld, on jurisdictionally void grounds, if Hirschfeld dared appear professionally at the courthouse to conduct hearings on behalf of his ongoing clients. Fields urged other judges under his administration to actively seek or fabricate grounds to interfere with Hirschfeld's ability to represent clients. Although Fields was originally joined under a conspiracy theory, it was accurately pointed out that Fields'

administrative misconduct is independently cognizable under 42 U.S.C. §1983.

CONCLUSION

The Supreme Court should grant Certiorari and thereafter remand the matter for further proceedings, including trial in the District Court, upon a finding that neither Judge Rogers nor judge Fields satisfied the requirements of absolute judicial immunity.



Dated September 8, 1998

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APPENDIX A
(Ninth Circuit Decision)
Filed Jun. 11, 1998

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT A. HIRSCHFELD
Plaintiff-Appellant

v.

ALFRED ROGERS,
CAROLYN ROGERS;
KENNETH L. FIELDS
ANDREA FIELDS;
MARTIN LaPRADE
Defendants-Appellees

No. 97-16957
D.C. CIV 95-1612 PHX EHC

MEMORANDUM[1]

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Submitted June 8, 1998[2]

Before: REINHARDT, THOMPSON and LEAVY, ... Circuit Judges

Robert A. Hirschfeld, a former attorney, appeals pro se the district court's summary judgment dismissal of his 42

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[2] The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, appellant's request for oral argument id (sic) denied.

U.S.C. §1983 action against two state court judges and an attorney involved in *Taliaferro v. Taliaferro*, a state marital dissolution proceeding, in which Hirschfeld represented Clinton Taliaferro, the husband. We have jurisdiction pursuant to 28 U.S.C. §1291. Re review de novo the district court's dismissal for failure to state a claim. See *Buckey v. County of Los Angeles*, 968 F.2d 791, 793-94 (9th Cir. 1992). We also review de novo a grant of summary judgment. See *Oregon Natural Resources Council, Inc. v. Kantor*, 99 F.3d 334, 337 (9th Cir. 1996). We affirm.

Hirschfeld contends that the district court erred by concluding that Judge Rogers and Judge Fields were entitled to absolute judicial immunity. We disagree.

The district court properly dismissed Hirschfeld's action against defendants Judge Rogers and Judge Fields because they are entitled to absolute judicial immunity for their judicial actions in *Taliaferro*. *See Crooks v. Maynard*, 913 F.2d 699, 700 (9th Cir. 1990)

Hirschfeld also contends that the district court erred by granting summary judgment in favor of attorney LaPrade on the ground that LaPrade did not act under color of state law. We disagree.

Because Hirschfeld failed to show that LaPrade's acts amounted to a conspiracy with defendant judges to violate Hirschfeld's civil rights, the district court properly granted summary judgment for LaPrade. See *Price v. State of Hawaii*, 939 F.2d 702, 707-09 (9th Cir. 1991).

Hirschfeld's argument that the district court abused its discretion by denying his request to file a second amended complaint also lacks merit. See *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995).

AFFIRMED

APPENDIX B
(First Order of Dismissal)
Filed Oct. 3, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ROBERT A. HIRSCHFELD
Plaintiff

CIV 95-1612 PHX EHC

v.

ALFRED ROGERS, et.al.
Defendants

ORDER

Plaintiff Robert A. Hirschfeld ("Hirschfeld" or "Plaintiff") is an attorney licensed to practice in Arizona. Hirschfeld, appearing pro se, filed this action alleging violation of his constitutional rights and state law claims. Plaintiff subsequently filed a First Amended Complaint alleging claims pursuant to 42 U.S.C. sections 1981-1988, state law, and purporting to bring a class action on behalf of his legal clients (Dkt.2) Named as Defendants in the amended complaint are: Alfred J. Rogers, an Arizona Superior Court Judge ("Rogers"), his wife, Carolyn, and their marital community; Kenneth L. Fields, an Arizona Superior Court judge and former presiding domestic relations judge of the Superior Court ("Fields"), his wife Andrea, and their marital community; and Martin D. LaPrade, an attorney licensed to practice in Arizona ("LaPrade")[1]

The Rogers and Fields have filed a motion to dismiss for failure to state a claim and have requested oral argument on their motion. (Dkt. 3 and 4) LaPrade has filed a motion for summary judgment. (Dkt. 8) Plaintiff has filed a motion for leave to amend his complaint. (Dkt. 6) Plaintiff has also filed

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[1] Plaintiff purports to sue Rogers solely in his capacity as a private citizen and purports to sue Fields in his capacity as a private citizen or his administrative capacity.

a motion to strike Defendants' response to the motion for leave to amend as untimely or alternatively seeks leave to file a factual reply. (Dkt. 13) Because the Court concludes that oral argument would not assist the court in resolving the motion to dismiss, that motion will be denied. The remaining motions are discussed below.

Background[2]

Hirschfeld was retained to represent Clinton Charles Taliaferro in dissolution proceedings in state court, *Taliaferro v. Taliaferro*, DR92-07715. LaPrade represented Johanna Antonia Taliaferro in the proceedings. On February 24, 1993, Hirschfeld filed a notice of change of judge in the case pursuant to Rule 42(f)(1) of the Arizona Rules of Civil Procedure.[3] At the time, the case was assigned to Judge Rogers. On February 25, 1993, Rogers denied the notice of change of judge because "a scheduled contested hearing" had taken place before him. Hirschfeld's client did not seek special action relief to appeal the denial. The case went to trial before Judge Rogers in July and August of 1993.

On August 24, 1993, Rogers entered a judgment which included an award against Hirschfeld personally to pay his client's wife's lawyers fees from the proceeds of the fees he earned from his client, and requiring him to pay the balance, if any, to the Clerk of the Superior Court as a

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[2] The Court takes judicial notice of facts set forth in *Taliaferro v. Taliaferro*, 219 Ariz. Adv. Rep. 29, 29 (June 20, 1996)(en banc) as background for Plaintiff's allegations.

[3] Rule 42(f)(1) of the Arizona Rules of Civil Procedure provides that each party is entitled to one change of judge. Rule 42(f)(1)(D) provides that "A party waives the right to change of judge as a matter of right when, after a judge is assigned to preside at trial, or is otherwise permanently assigned to the action, the party ... participates before that judge in [a] Any scheduled contested matter in the case ..."

sanction for egregious misconduct.[4] Hirschfeld and his client appealed the order to the Court of Appeals.

Hirschfeld alleges that the following events occurred while the matter was pending before the Court of Appeals: LaPrade submitted a form of order, later signed by Rogers, ordering Hirschfeld to show cause why he should not be held in contempt for failure to pay the court ordered sanction. A show cause hearing was held on February 22, 1994 at which only counsel for Hirschfeld appeared. Hirschfeld's counsel moved to quash the order to show cause in part contending that incarceration for contempt for failure to pay the sanction was unconstitutional. Hirschfeld alleges that Sheriff's deputies were present at the hearing to take him into custody if he appeared.

Hirschfeld alleges that Rogers did not rule on the motion to quash, but instead set a second show cause hearing for March 11, 1994 and threatened to issue a warrant for Hirschfeld's arrest if he failed to appear in person at that hearing. Hirschfeld alleges that he was never personally served with the order.

Hirschfeld alleges that on March 8, 1994, he filed a "Suggestion of Recusal." Hirschfeld did not appear in person at the show cause hearing on March 11; Rogers continued the hearing until that afternoon. Hirschfeld did not appear at the continued hearing. Rogers issued an arrest warrant on March 14 or 15.

Hirschfeld alleges that on March 14, 1994, he filed a Special Action in the Arizona Court of Appeals and was granted a 24-hour stay of the contempt and arrest proceedings, Rogers thereafter quashed the arrest warrant based on the lack of service of the order setting the show cause hearing. The Court of Appeals did not renew the stay.

Plaintiff alleges that on March 22, 1994, LaPrade submitted a form of order, later signed by Rogers setting a

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[4] Plaintiff alleges that the sanction, which he alleges Rogers referred to as a "judgment," was for $20,000.

show cause hearing on April 4, 1994 regarding contempt and possible sanctions. Hirschfeld was personally served with the order. On April 4, 1994, Hirschfeld filed a response to the show cause order in which he argued that Rogers had been divested of jurisdiction in the underlying case by the notice of change of judge. Hirschfeld appeared through counsel at the show cause hearing. Plaintiff alleges that Rogers orally stated that he would not consider Hirschfeld's written response, issued an arrest warrant for Hirschfeld, and set cash bond of $22,000 to be applied against the sanctions previously entered against Hirschfeld.

Hirschfeld alleges that on May 5, 1994, he was arrested pursuant to the warrant and was held in custody for approximately 30 hours. Plaintiff alleges that LaPrade urged and Rogers required Hirschfeld to post bond for release. Appearance Bond Surety John Hirschfeld, now deceased, caused $22,000 to be paid to the Clerk of the Maricopa County Superior Court. Hirschfeld alleges that he remains obligated to repay the bond to Hirschfeld's estate.

Hirschfeld alleges that he appeared in person at the subsequent contempt hearing. Hirschfeld alleges that Rogers refused to conduct an evidentiary hearing regarding contempt to avoid making an appealable record. Hirschfeld alleges that Rogers ordered that the appearance bond be held for the purpose of satisfying the money judgment entered against him.

On October 17, 1995, the Court of Appeals ruled on Hirschfeld's and his client's appeal. The Court of Appeals concluded that Hirschfeld's client had not waived his right to change of judge, that the issue could be raised on appeal, and that once the notice was filed, Rogers lacked subject matter jurisdiction to proceed. The court vacated the final decree.

On June 20, 1996, The Arizona Supreme Court reversed the appellate court holding that the failure of a trial judge to honor a notice of change of judge did not affect the subject matter jurisdiction of the court. *Taliaferro v. Taliaferro*, Ariz. Adv. Rep. 29,29 (June 20, 1996) (en banc).

The court further held that rulings by noticed judges on the propriety of the notice are only reviewable by way of special action relief. Id. At 30. The court remanded to the court of appeals for consideration of all other issues properly raised on appeal. Id. At 31.

Plaintiff filed this action in August 1995, while the Taliaferro case was pending in the Court of Appeals. In December 1995, before service on any defendant, Plaintiff filed his First Amended Complaint alleging claims pursuant to 42 U.S.C. §§1981-88 and state law tort claims related to Defendants' actions in connection to the *Taliaferro* case. Hirschfeld also purported to bring claims on behalf of members of a class comprised of his clients, contending that Defendants tortiously interfered with their attorney fee contracts and provision of legal services by Hirschfeld to them.

I. Motion for Leave to Amend and Motion to Strike

Plaintiff has filed a motion for leave to file a proposed Second Amended Complaint. Plaintiff has also filed a "motion to strike the Attorney General's untimely response to the motion to amend or alternatively motion for leave for factual reply if response is deemed to invoke summary judgment rules."

With respect to the motion to strike, the time to respond to a motion for leave to amend is ten days. "When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation." Rule 6(a), Fed.R.Civ.P. Martin Luther King, Jr. day is a legal holiday. Id. Plaintiff filed his motion on January 4, 1996. Defendants filed their response on January 15, 1996. The Martin Luther King, Jr. Holiday fell on January 18, 1996. Defendants' response was timely.

In the alternative, Plaintiff claims that Defendants have raised factual questions as to whether Plaintiff is a

member of the class of discriminated-against fathers in their response to the motion for leave to amend and asks leave to file a "factual reply." Defendants' allegations in their response do not entitle Plaintiff to allege additional facts in his reply; the allegations of the proposed amended complaint is controlling. The motion to strike or alternatively for leave to file a factual reply will be denied.

With respect to the proposed Second Amended Complaint, Plaintiff seeks to bring claims on behalf of a class comprised of male parents who have entered into an attorney fee contract with Plaintiff for dissolution and child custody matters and whose contracts have been allegedly tortiously interfered with by Defendants' actions. Plaintiff contends that Defendants' actions were based on his clients' gender. Plaintiff relies primarily on *Caban v. Mohammed*, 441 U.S. 380, 391, 99 S.Ct. 1760,1767, 60 L.Ed.2d 297 (1979). In Caban, the Supreme Court held that a New York statute that distinguished between unmarried mothers and unmarried fathers with respect to the adoption of a child violated the Equal Protection Clause of the Fourteenth Amendment.

In his Complaint and First Amended Complaint, Plaintiff did not allege that he was a member of any class entitled to protection under §1985, nor even that members of his proposed class were entitled to protection under §1985. In his proposed Second Amended Complaint, Plaintiff has not alleged that he is a member of a class entitled to protection under §1985, merely that he is an advocate for persons who may be entitled to protection under §1985. Plaintiff has not sought certification of a class or designation as a class representative pursuant to Rule 23, nor has Plaintiff brought suit in the name of a class protected under §1985. Plaintiff lacks standing to assert claims on behalf of members of a protected class in which he does not allege that he is a member. Plaintiff's motion for leave to amend will be denied based upon the futility of amendment.

II. Motion to Dismiss

The Rogers and Fields seek dismissal of Plaintiff's claims brought pursuant to 42 U.S.C. §1981-1988 for failure to state a claim based upon absolute judicial immunity. (Dkt. 4) These Defendants seek dismissal of Plaintiff's remaining claims based on the absence of pendant jurisdiction and/or sovereign immunity under the Eleventh Amendment.

In considering a motion to dismiss for failure to state a claim upon which relief can be granted, all material allegations in the complaint are accepted as true and are to be construed in the light most favorable to the non-moving party. *Russell v. Landrieu*, 621 F.2d 1037 (9th Cir. 1980). A dismissal under Rule 12(b)(6) is essentially a ruling on a question of law. *North Star Inter'l. v. Arizona Corp. Comm.*, 720 F.2d 578 (9th Cir. 1983) For a defendant-movant to succeed, it must appear to a certainty that a plaintiff will not be entitled to relief under any set of facts that could be proven under the allegations of the complaint. *Halet v. Wend Investment Co.*, 672 F.2d 1305 (9th Cir. 1982)

A. Section 1985 Claims

Plaintiff purports to bring claims pursuant to 42 U.S.C. §1985. To maintain a claim under §1985, a plaintiff must allege intent to deprive an individual of equal protection or equal privileges and immunities based upon racial, or other class-based, invidiously discriminatory animus. *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1518 (9th. Cir. 1987). See *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 1798, 29 L.Ed. 2d 338 (19721); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1259, 1536 (9th Cir. 1992).

Plaintiff has not alleged in his First Amended Complaint that he was a member of a protected class or that Defendants intended to deprive him of his constitutional rights based upon membership in a protected class. To the

extent that Plaintiff brings claims pursuant to §1985, these claims will be dismissed.

B. Section 1983 Claims

"To make out a cause of action under §1983, [a] plaintiff must plead that (1) the defendants act[ed] under color of state law [and] (2) deprived plaintiff of rights secured by the Constitution or federal statutes." *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir, 1986), cert. denied, 479 U.S. 1054 (1987).

Plaintiff alleges that: Rogers violated his right to due process under the Fourteenth Amendment by causing him to be imprisoned to collect a money judgment; Rogers violated his constitutional rights by holding him in contempt to enforce a judgment; that Rogers violated his right to due process by failing to hold an evidentiary hearing and failing to make an appealable record of such hearing; and that Rogers and LaPrade engaged in "ex parte collusion" constituting ethical misconduct defeating judicial immunity and conspired to violate Plaintiff's constitutional rights.

Judges are absolutely immune from damage liability under §1983 for judicial acts performed within their jurisdiction. *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986). "Judicial immunity applies `however erroneous the act may have been, however injurious in its consequences it may have proved to the plaintiff' " Id. At 1075, quoting *Cleavinger v. Saxner*, 474 U.S. 507, 106 S.Ct. 496, 500, 88 L.Ed.2d 507 (1985). A judge loses immunity only for acts performed in the "clear absence of all jurisdiction," *Ashelman* at 1075, quoting *Bradley v. Fisher*, 80 U.S. 351 (1872), or for acts that are not "judicial" in nature. *Stump v. Sparkman*, 435 U.S. 349, 360, 99 S.Ct. 1099, 1109, 55 L.Ed.2d 331 (1978).

To determine whether jurisdiction exists under §1983, courts examine whether the judge was clearly acting beyond the scope of his subject matter jurisdiction.

Ashelman, 793 at 1076. The scope of a judge's jurisdiction is broadly construed to effectuate the policies supporting immunity, Id. Factors relevant in determining whether an act was judicial "relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectation of the parties, i.e., whether they dealt with the judge in his judicial capacity." *Stump*, 435 U.S. at 362. The function of resolving disputes between the parties and authoritatively adjudicating private rights is a judicial function. *Atkinson-Baker & Assoc., Inc. v. Kolts*, 7 F.3d 1452, 1454 (9th Cir. 1993)

The recent opinion of the Arizona Supreme Court dispels any question that Judge Rogers improperly retained subject matter jurisdiction in the Taliaferro case despite the purportedly valid and timely notice of change of judge. The acts complained of by Judge Rogers in the Taliaferro case, including imposition of sanctions, contempt proceedings, issuance of arrest warrant for contempt, requiring the posting of an appearance bond, and even alleged ex parte communications with opposing counsel are entitled to absolute immunity. *See, Cleavinger*, 474 U.S. at 200 (judges are entitled to absolute immunity "despite and `informality with which [the judge] proceeded,' and despite an ex parte feature of the proceeding.") (internal citation omitted).

Plaintiff's remaining constitutional claims that Rogers conspired to violate his constitutional rights are conclusory and vague. Vague and conclusory allegations are not sufficient to withstand dismissal on a Rule 12(b) motion. *Ivey v. Board of Regents*, 673 F.2d 267, 168 (9th Cir. 1982).

The Court will grant the motion to dismiss the claims brought against Rogers pursuant to 42 U.S.C. §§1981-1988 for failure to state a claim and dismiss Rogers from this action as to the state law claims for lack of subject matter jurisdiction. Rogers' marital community will also be dismissed.

Plaintiff alleges that Fields knew or had reason to know of Rogers' actions which were purportedly outside his

jurisdiction (i.e., denying the change of judge, sanctioning Plaintiff, issuing an arrest warrant, and detaining Plaintiff pending posting of an appearance bond), that such acts were unconstitutional, and that Fields thereby joined in the alleged conspiracy to violate Plaintiff's constitutional rights. The Court has concluded that Rogers is entitled to absolute judicial immunity with respect to his allegedly unconstitutional actions and dismissed the conspiracy claims as vague and conclusory. Accordingly, Plaintiff's claims against Fields brought pursuant to 42 U.S.C. §§1981-1988 will be dismissed for failure to state a claim. The state law claims against Fields will be dismissed for lack of subject matter jurisdiction. Fields' wife and marital community will also be dismissed from this action.

III. Motion for Summary Judgment

Defendant LaPrade has filed a motion for summary judgment on the basis that the allegations of Plaintiff's amended complaint are unsubstantiated, unsupported by the evidence, and amount to mere conjecture. LaPrade cites no authority. Hirschfeld opposes the motion and has submitted his affidavit in support thereof.

Summary Judgment should be granted only if the movant shows there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c) *Waggoner v. Snow, Becker, Krill, Karis & Krauss*, 991 F.2d 1501, 1505 (9th 1993). "One of the principal purposes of the summary judgment rules is to isolate and dispose of factually unsupported claims." *Celotex Corporation v. Catrett*, 477 U.S. 317, 323-24 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986).

A dispute about a material fact is genuine if "there is sufficient evidence favoring the nonmoving party for a jury

to return a verdict for that party. Id. At 249. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Id. At 249-50, In a civil case, the question is: "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." Id at 252. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Id. The moving party need not disprove matters on which the opponent has the burden of proof at trial. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986) Thus, summary judgment is proper if the non-moving party fails to make a showing sufficient to establish the existence of an essential element of their case on which they will bear the burden of proof at trial. Id.; See also *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir, 1980)

LaPrade's motion is supported by his affidavit in which he describes his involvement in the underlying Taliaferro case and disavows Plaintiff's substantive allegations of wrongdoing, including conspiring with Rogers to violate Plaintiff's constitutional rights. Plaintiff opposes the motion with his affidavit.

In his affidavit, Plaintiff avers that LaPrade submitted motions and proposed orders seeking "incarceration" of Plaintiff to compel payment of the ordered sanctions; that LaPrade submitted these motions and forms of order during the period when plaintiff was preparing appellate briefs; that LaPrade intended to "deter or interfere" with preparation of the appellate briefs; and that LaPrade engaged in ex parte communications with Rogers regarding the drafting of the motions and proposed orders.

In order to prevail on a motion for summary judgment on claims brought pursuant to section 1983, the complaint must contain facts that make at least a facial showing that each defendant was acting under color of state law. See, generally, *Dennis v. Sparks*, 449 U.S. 24, 28-29, 101 S.Ct. 183, 186-87, 66 L.Ed.2d 185 (1980). The

Fourteenth Amendment offers no protection against private conduct, no matter how wrongful, outrageous or discriminatory. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974) A privately retained attorney does not act under color of state law when performing functions as counsel. *Polk v. Dodson*, 454 U.S. 312, 325, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981). However, an otherwise private person who conspires with state officials to deprive another of constitutional rights acts under color of state law. *Tower v. Glover*, 467 U.S. 914, 920, 104 S.Ct. 2820, 81 L.Ed.2d 758 (1982); *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996).

Plaintiff's allegations that LaPrade submitted forms of Orders to Rogers, that he urged Plaintiff held in contempt for failure to comply with Judge Rogers' orders, and that he urged Plaintiff be required to post bond before release were acts taken on behalf of his client during litigation of the case. With respect to these actions, Plaintiff has not presented evidence from which it can be concluded or shown that these actions were undertaken under color of state law.

Plaintiff also alleges that LaPrade conspired with Rogers to violate his constitutional rights and/or engaged in ex parte communications with Rogers. LaPrade has presented his affidavit averring that he did not conspire with Rogers to violate plaintiff's constitutional rights or hold ex parte communications with Rogers. Plaintiff submits his affidavit which alleges that witnesses can testify as to ex parte communications between Rogers and LaPrade about the content of the forms of orders submitted by LaPrade to Rogers.

To prove conspiracy under §1983, an agreement or meeting of the minds to violate the plaintiff's constitutional rights must be shown. *Buckey v. County of Los Angeles*, 968 F.2d 791, 794 (9th Cir.) (claim of conspiracy under section 1983 must be supported by specific facts showing existence of conspiracy. *Cert. denied*, 113 S.Ct. 599 and 113 S.Ct. 600 (1992) Even if plaintiff establishes that LaPrade had ex parte

communications with Rogers through competent evidence, such evidence does not raise a genuine issue of material fact supporting that was a meeting of the minds between LaPrade and Rogers to violate plaintiff's constitutional rights under color of state law. Accordingly, LaPrade is entitled to summary judgment on plaintiff's claims against him.

IT IS ORDERED denying Defendants' motion for oral argument on their motion to dismiss. (Dkt. 3)

IT IS FURTHER ORDERED granting Defendants' Motion to Dismiss (Dkt. 4)

IT IS FURTHER ORDERED denying Plaintiff's motion for leave to amend his complaint. (Dkt. 6)

IT IS FURTHER ORDERED denying Plaintiff's motion to Strike Defendants' response to the motion to amend or alternatively for motion for leave to file a factual reply. (Dkt. 8)

IT IS FURTHER ORDERED granting Defendant LaPrade's motion for summary judgment. (Dkt. 8)

IT IS FURTHER ORDERED entering judgment in favor of Defendants and that Plaintiff take nothing.

DATED this 30 day of September 1996.

/S/_____
Earl H. Carroll
United States District Judge

APPENDIX C
(Second Order of Dismissal on Reconsideration)
Filed Sep. 30, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ROBERT A. HIRSCHFELD
Plaintiff

CIV 95-1612 PHX EHC

v.

ALFRED ROGERS, et.al.
Defendants

ORDER

I. Background[1]

Plaintiff Robert A. Hirschfeld ("Hirschfeld" or "Plaintiff") is an attorney licensed to practice in Arizona. Hirschfeld was retained to represent Clinton Charles Taliaferro in dissolution proceedings in state court, *Taliaferro v. Taliaferro*, DR92-07715. Defendant Martin D. LaPrade represented Johanna Antonia Taliaferro in the proceedings.

On February 24, 1993, Hirschfeld filed a notice of change of judge in the case pursuant to Rule 42(f)(1) of the Arizona Rules of Civil Procedure.[2] At the time, the case was assigned to Judge Rogers. On February 25, 1993, Rogers denied the notice of change of judge because "a scheduled contested hearing" had taken place before him. Hirschfeld's

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[1] The Court took judicial notice of facts set forth in Taliaferro v. Taliaferro, 219 Ariz. Adv. Rpt 29, 29 (June 20, 1996) (en banc) as background for Plaintiff's allegations in its previous order.

[2] Rule 42(f)(1) of the Arizona Rules of Civil Procedure provides that each party is entitled to one change of judge. Rule 42(f)(1)(D) provided at that time that: "A party waives the right to change of judge as a matter of right when, after a judge is assigned to preside at trial, or is otherwise permanently assigned to the action, the party ... participates before that judge in [a] Any scheduled contested matter in the case ..."

client did not seek special action relief to appeal the denial. The case went to trial before Judge Rogers in July and August of 1993.

On August 24, 1993, Rogers entered a judgment which included an award against Hirschfeld personally to pay his client's wife's lawyers fees from the proceeds of the fees he earned from his client, and requiring him to pay the balance, if any, to the Clerk of the Superior Court as a sanction for egregious misconduct.[3] Hirschfeld and his client appealed the order to the Court of Appeals.

Hirschfeld alleges that the following events occurred while the matter was pending before the Court of Appeals: LaPrade submitted a form of order, later signed by Rogers, ordering Hirschfeld to show cause why he should not be held in contempt for failure to pay the court ordered sanction. A show cause hearing was held on February 22, 1994 at which only counsel for Hirschfeld appeared. Hirschfeld's counsel moved to quash the order to show cause in part contending that incarceration for contempt for failure to pay the sanction was unconstitutional. Hirschfeld alleges that Sheriff's deputies were present at the hearing to take him into custody if he appeared.

Hirschfeld alleges that Rogers did not rule on the motion to quash, but instead set a second show cause hearing for March 11, 1994 and threatened to issue a warrant for Hirschfeld's arrest if he failed to appear in person at that hearing. Hirschfeld alleges that he was never personally served with the order.

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[3] Plaintiff alleges that the sanction, which he alleges Rogers referred to as a "judgment," was for $20,000.

Hirschfeld alleges that on March 14, 1994, he filed a Special Action in the Arizona Court of Appeals and was granted a 24-hour stay of the contempt and arrest proceedings, Rogers thereafter quashed the arrest warrant based on the lack of service of the order setting the show cause hearing. The Court of Appeals did not renew the stay.

Plaintiff alleges that on March 22, 1994, LaPrade submitted a form of order, later signed by Rogers setting a show cause hearing on April 4, 1994 regarding contempt and possible sanctions. Hirschfeld was personally served with the order. On April 4, 1994, Hirschfeld filed a response to the show cause order in which he argued that Rogers had been divested of jurisdiction in the underlying case by the notice of change of judge. Hirschfeld appeared through counsel at the show cause hearing. Plaintiff alleges that Rogers orally stated that he would not consider Hirschfeld's written response, issued an arrest warrant for Hirschfeld, and set cash bond of $22,000 to be applied against the sanctions previously entered against Hirschfeld.

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On October 17, 1995, the Court of Appeals ruled on Hirschfeld's and his client's appeal. The Court of Appeals concluded that Hirschfeld's client had not waived his right to

change of judge, that the issue could be raised on appeal, and that once the notice was filed, Rogers lacked subject matter jurisdiction to proceed. The court vacated the final decree.

On June 20, 1996, The Arizona Supreme Court reversed the appellate court holding that the failure of a trial judge to honor a notice of change of judge did not affect the subject matter jurisdiction of the court. *Taliaferro v. Taliaferro,* Ariz. Adv. Rep. 29,29 (June 20, 1996) (en banc). The court further held that rulings by noticed judges on the propriety of the notice are only reviewable by way of special action relief. Id. At 30. The court remanded to the court of appeals for consideration of all other issues properly raised on appeal. Id. At 31.

Plaintiff filed this action in August 1995, while the *Taliaferro* case was pending in the Court of Appeals. In December 1995, before service on any defendant, Plaintiff filed his First Amended Complaint alleging claims pursuant to 42 U.S.C. §§1981-88 and state law tort claims related to Defendants' actions in connection to the Taliaferro case. Hirschfeld also purported to bring claims on behalf of members of a class comprised of his clients, contending that Defendants tortiously interfered with their attorney fee contracts and provision of legal services by Hirschfeld to them.

Named as Defendants in the amended complaint are: Alfred J. Rogers, an Arizona Superior Court Judge ("Rogers"), his wife, Carolyn, and their marital community; Kenneth L. Fields, an Arizona Superior Court judge and former presiding domestic relations judge of the Superior Court ("Fields"), his wife Andrea, and their marital community; and Martin D. LaPrade, an attorney licensed to practice in Arizona ("LaPrade")[4]

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[4] Plaintiff purported to sue Rogers solely in his capacity as a private citizen and purported to sue Fields in his capacity as a private citizen or his administrative capacity.

This Court granted motions to dismiss filed by the Rogers' and the Fields'. (Dkt. 22) The Court granted LaPrade summary judgment. (Dkt. 22)

Pending are: Defendants' "Motion for Rule 11 Sanctions on behalf of Judge Alfred Rogers and Carolyn Rogers and Judge Kenneth Fields and Andrea Fields." Plaintiff's "Motion to Alter or Amend Judgment; Motion for Reconsideration; Alternatively Motion for Relief from Judgment" and "Motion for Leave to Consolidate Plaintiff's Further Response to Rule 11(c)(1)(A) Motion with his Response to Defendant Judges' District Court Local Rule 2.20(b)(2) Memorandum." These motions are addressed below.

I. Plaintiff's Motion to Alter or Amend Judgment

Plaintiff asks the Court to alter or amend judgment pursuant to Rules 59 and 60 of the Federal Rules of Civil Procedure. Where a motion is submitted after entry of judgment, the only appropriate procedural devices are: (1) motion to alter or amend judgment pursuant to Rule 59(e), Federal Rules of Civil Procedure, or; (2) a motion for relief from judgment pursuant to Rule 60(b), Federal Rules of Civil Procedure.

To the extent that Plaintiff's Motion calls into question the correctness of the underlying judgment, it is a Rule 59(e) motion to alter or amend judgment. *Fischer v. United States Department of Justice*, 759 F.2d 461, 464 (5th Cir. 1985) See also *Mundan v. Ultra Alaska Associates*, 849 F.2d 383, 387 (9th Cir. 1988); *Sea Ranch Association v. California Coastal Zone Conservation Comm'n.*, 537 F.2d 1058, 1061 (9th Cir. 1978); 9 J. Moore, *Moore's Federal Practice* ¶ 204.12[1] (1985) ("Any motion that draws into question the correctness of the judgment is functionally a motion under Civil Rule 59(e), whatever its label.")

Reconsideration pursuant to Rule 59(e) "is appropriate if the district court (1) is presented with newly

discovered evidence; (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law. There may also be other, highly unusual, circumstances warranting reconsideration." *School Dist. No. 1J, Multnomah County v. ACandS, INC.*, 5 F.3d 1255, 1263 (9th Cir. 1993) (citation omitted), cert. denied, 114 S.Ct. 2742 (1994)

Rule 60(b)(1) permits courts to relieve a party from an order or judgment for "mistake, inadvertence, surprise, or excusable neglect." The movant bears the burden of alleging a basis to set aside an order or judgment. *Cassidy v. Tenorio*, 856 F.2d 1412, 1415 (9th Cir. 1988)

Plaintiff asks the Court to reconsider its ruling on Defendants' motions to dismiss and for summary judgment on five grounds: (1) consideration of the Arizona Supreme Court's decision in *Taliaferro* after submission of those motions without giving plaintiff an opportunity to distinguish or rebut; (2) "[r]eliance by this Court upon an exculpatory Affidavit" of LaPrade which "materially conflicts with factual admissions made by LaPrade" and (3) the availability of a new affidavit allegedly probative of the alleged conspiracy between Rogers and LaPrade; (4) misconstruction of the nature of the proposed class against whom Defendants were alleged to have conspired to invidiously discriminate; and (5) denial of the motion to amend contemporaneously with a ruling on the motions to dismiss and for summary judgment.

A.Consideration of the Ariz. Supreme Court's Decision

1. Judge Rogers

Plaintiff contends that this Court "excessively extrapolated" from the Arizona Supreme Court's decision in Taliaferro in determining that Rogers and Fields were entitled to absolute judicial immunity. Plaintiff contends that

the Arizona Supreme Court found that the Superior Court was not deprived of subject matter jurisdiction, but did not address whether an individual judge of the Superior Court was divested of subject matter jurisdiction, i.e., the Superior Court has subject matter jurisdiction but the Superior Court judge before whom the matter was pending did not. Plaintiff cites no authority for this proposition.

Plaintiff also contends that he "arguably" has been subjected to "the most cynical deprivation of procedural and substantive due process rights" by the Arizona Supreme Court's decision and the "supposedly retroactive denial of the Right of Appeal regarding a judge's lack of Subject Matter Jurisdiction." (emphasis in original)

Even if plaintiff's contentions had merit and Judge Rogers lacked subject matter jurisdiction in Taliaferro, that is not sufficient to defeat absolute judicial immunity. As previously noted by this Court:

> "Judges are absolutely immune from damage liability under §1983 for judicial acts performed within their jurisdiction. *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986). "Judicial immunity applies `however erroneous the act may have been, however injurious in its consequences it may have proved to the plaintiff' " Id. At 1075, quoting *Cleavinger v. Saxner*, 474 U.S. 507, 106 S.Ct. 496, 500, 88 L.Ed.2d 507 (1985). A judge loses immunity only for acts performed in the "clear absence of all jurisdiction," *Ashelman* at 1075, quoting *Bradley v. Fisher*, 80 U.S. 351 (1872), or for acts that are not "judicial" in nature. *Stump v. Sparkman*, 435 U.S. 349, 360, 99 S.Ct. 1099, 1109, 55 L.Ed.2d 331 (1978)."
>
> "To determine whether jurisdiction exists under §1983, courts examine whether the judge was clearly acting beyond the scope of his subject matter jurisdiction. *Ashelman*, 793 at 1076. The scope of a judge's jurisdiction is broadly construed to effectuate the policies supporting immunity, Id. Factors relevant in

determining whether an act was judicial "relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectation of the parties, i.e., whether they dealt with the judge in his judicial capacity." *Stump*, 435 U.S. at 362. The function of resolving disputes between the parties and authoritatively adjudicating private rights is a judicial function. *Atkinson-Baker & Assoc., Inc. v. Kolts*, 7 F.3d 1452, 1454 (9th Cir. 1993)"

This Court concluded that Judge Rogers' actions were clearly functions normally performed by a judge and taken in his capacity as judge. See, *Cleavinger*, 474 U.S. at 200. Plaintiff has not offered new evidence or cited to the Court new law changing this analysis.

2. Judge Fields

Plaintiff next contends that Judge Fields is not entitled to absolute judicial immunity because he was named in his personal capacity and in his administrative capacity as the Presiding Domestic Relations Judge for the Maricopa County Superior Court. Plaintiff contends that Judge Fields' participation in the alleged conspiracy did not involve the resolution of private rights and that Fields is therefore not entitled to judicial immunity.

Absolute judicial immunity does not extend to administrative decisions, even those that may be essential to the very functioning of the courts. *Forrester v. White*, 484 U.S. 230, 108 S.Ct. 538, 544-545 (1988).

Plaintiff alleged that Judge Fields engaged in administrative conferences with other judges of the Maricopa County Superior Court and issued written and/or oral administrative directives for the purpose of damaging Plaintiff's reputation and ability to practice law; exhibited an "extreme and virulent personal bias, prejudice and malice against Plaintiff" both on and off the record; alerted the Maricopa County Sheriff's Department and caused

Plaintiff's photograph to be posted at various court buildings urging detention or arrest pursuant to Judge Rogers' contempt orders, and urged domestic relations judges in Maricopa County "to be vigilant for any ground, no matter how insignificant, for which [Plaintiff] might be sanctioned, criminally charged, suspended from practice or disbarred." (Dkt. 24 at 9) (internal quotation marks omitted).

To state a defamation claim under §1983, a plaintiff must join the defamation claim to a cognizable constitutional tort such as denial of equal protection or due process. *Buckey v. County of Los Angeles*, 968 F.2d 791, 795 (9th Cir 1992), cert. denied, *sub nom., City of Manhattan Beach v. Buckey*, ---U.S. ---, 113 S.Ct. 599, 121 L.Ed.2d 536 (1993) and *Childrens' Institute Intern. V. Buckey*, 113 S.Ct. 600, 121 L.Ed.2d 536 (1993). Business and reputational losses alone do not transform an ordinary defamation action into a §1983 claim, *Buckey v. County of Los Angeles*, 968 F.2d 791, 795 (9th Cir 1992), nor constitute a recognized liberty or property interest sufficient to invoke the procedural protections of the Due Process clause of the Fourteenth Amendment. *Paul v. Davis*, 424 U.S. 693, 711, 96 S.Ct. 1155, 1165, 47 L.Ed.2d 405 (1976). "To state a defamation-plus claim, a plaintiff must join a defamation claim to a recognizable section 1983 wrong such as denial of equal protection and substantive due process..." Buckey, 968 F.2d at 795.

As previously determined by this Court, Plaintiff has not alleged a cognizable equal protection claim. He also fails to state a procedural due process claim in connection with Judge Fields; he does not allege a deprivation of any process due.

Plaintiff also fails to allege a claim for deprivation of substantive due process. Substantive due process "prevents the government from engaging in conduct that `shocks the conscience' or interferes with rights `implicit in the concept of ordered liberty.' " *United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697 (1987) (internal citations omitted). However, substantive due process should

not "be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law . . ." *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 1070, 117 L.Ed.2d 261 (1992). "'[T]he doctrine of substantive due process does not protect individuals from all [governmental] actions that infringe liberty or injure property in violation of some law.'" *Santiago de Castro v. Morales Medina*, 943 F.2d 129 at 130-31 (1st Cir. 1991) (internal citations omitted). Substantive due process rights are violated when a basic and fundamental principle has been violated. Santiago de Castro, 943 F.2d at 131. See *Mullins v. Oregon*, 57 F.3d 789, 793 (9th Cir. 1995)

The "narrow range of liberty interests" protected by substantive due process are "those aspects of liberty that we as a society traditionally have protected as fundamental." Id. Thus, substantive due process protections generally apply only "to matters relating to marriage, family, procreation and the right to bodily integrity." *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 812 (1994). Plaintiff has not alleged acts by Judge Fields which implicate matters relating to marriage, family, procreation or the like, and thus has not alleged a violation of substantive due process.

Even if Plaintiff has alleged a claim for defamation, he has not joined such a claim with a cognizable §1983 claim against Judge Fields. The court will grant Plaintiff's motion to alter or amend to the extent that Plaintiff's claims against Judge Fields will be dismissed on the alternative basis of failure to state a §1983 claim against him.

B. Summary Judgment for LaPrade

Plaintiff contends that the Court erred in granting LaPrade summary judgment based upon the insufficiency and dismissal of the conspiracy allegations.

The Court granted LaPrade summary judgment based upon Plaintiff's failure to show that LaPrade acted under color of state law, To prevail on a motion for summary

judgment on claims brought pursuant to section 1983, a plaintiff must show that each defendant was acting under color of state law. See, generally, *Dennis v. Sparks*, 449 U.S. 24, 28-29, 101 S.Ct. 183, 186-87, 66 L.Ed. 2d 185 (1980). Plaintiff did not and has not shown that LaPrade acted under color of state law.

Plaintiff also contends that the Court erred in granting summary judgment in light of his affidavit in which he averred that LaPrade had discussed revising a proposed form of order pursuant to Judge Rogers' instructions in connection with the contempt proceedings. Plaintiff contends that LaPrade's secretary, his sister, could confirm that the proposed order(s) were the result of ex parte discussions between Judge Rogers and LaPrade.

The court previously noted that preparation of a form of order pursuant to court instruction, even ex parte instruction, did not rise to the level of a constitutional violation. Additional evidence of such activity would not alter this conclusion. Plaintiff's motion to alter or amend will be denied as to LaPrade.

C. Dismissal of Claim for Class Action

The Court previously denied Plaintiff leave to file a proposed second amended complaint. In his proposed Second Amended Complaint, Plaintiff sought to bring claims on behalf of a class comprised of fathers who had entered into attorney fee contracts with him regarding dissolution and child custody matters and with which Defendants' actions had allegedly interfered. The Court denied Plaintiff leave to file the second amended complaint because Plaintiff failed to allege that he was a member of the proposed class. The Court additionally noted that Plaintiff had not filed a motion to certify a class or otherwise shown that class certification was appropriate.

Plaintiff now contends that he is "inherently" a member of the proposed class and that the Court erred in

denying him leave to file his second amended complaint. As previously noted by this Court:

> To maintain a claim under §1985, a plaintiff must allege intent to deprive an individual of equal protection or equal privileges and immunities based upon racial, or other class-based, invidiously discriminatory animus. *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1518 (9th. Cir. 1987). *See Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 1798, 29 L.Ed. 2d 338 (19721); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1259, 1536 (9th Cir. 1992).
>
> To state an Equal Protection claim, a plaintiff must allege that he has been denied a right or benefit because he is a member of a protected or suspect class, such as racial minority, or that he has been denied some fundamental right. See, *Golden State Transit Corp. v. City of Los Angeles*, 686 F.2d 758, 760 (9th Cir. 1982), cert. denied, 459 U.S. 1105, 103 S.Ct. 729, 74 L.Ed. 2d 954 (1983); *Holloway v. Arthur Anderson*, 566 F.2d 659, 661 (9th Cir. 1977); *See also*, *McGowen v. Maryland*, 366 U.S. 420, 425-26, 81 S.Ct. 1101, 6 L.Ed. 2d 393 (1969).
>
> Plaintiff has not alleged membership in a protected or suspect class or the denial of a fundamental right. Plaintiff does not cite authority for the proposition that fathers, fathers that have entered fee agreements with him, or divorced fathers are members of a protected class. Plaintiff did not allege in his First Amended Complaint or his proposed Second Amended Complaint that he was a member of a protected class or that Defendants intended to deprive him of his constitutional rights based upon membership in a protected class. Plaintiff's motion will be denied with respect to his motion for leave to file a second amended complaint.

II. Defendants' Motion for Rule 11 Sanctions and Attorney' fees

The Rogers' and Fields' filed a motion for rule 11 sanctions on the basis that Plaintiff's claims were not warranted by existing law. This motion was submitted on December 22, 1995. Defendants explicitly stated in the motion that it would be filed if Plaintiff failed to withdraw his claims within 21 days; however, the motion was not filed until the day after Plaintiff filed his motion to alter or amend, approximately ten months later. The Rogers' and Fields' subsequently filed a motion for award of attorneys' fees pursuant to Local Rule 2.20 and 42 U.S.C. §1988. (Dkt. 26)

In response, Plaintiff filed a "Preliminary Response to Defendant Judges' FRCP 11(c)(1)(A) Motion; Motion for Leave to Submit Preliminary Response; Motion to Stay Rule 11(c)(1)(A) Consideration Until After Ruling on Pending Rule 59 and 60 Motions for Leave for Plaintiff to Submit Further Response; Motion for Leave to Consolidate Plaintiff's Further Response to Rule 11(c)(1)(A) Motion with His Response to Defendant Judges' District Court Local Rule 2.20(b)(2) Memorandum." (Dkt. 29)

Plaintiff's Motion to Stay will be denied as moot. (Dkt. 29-3). The Court will grant Plaintiff leave to respond to the motion for attorney's fees. The Court will otherwise deny Plaintiff's motions and will not consider Plaintiff's preliminary response. The Court will stay consideration of the motions for attorneys' fees and for Rule 11 sanctions pending briefing of these motions.

IT IS ORDERED granting Plaintiff's motion to alter or amend judgment to the extent that Plaintiff's claims against Defendant Fields are dismissed on the alternative basis discussed herein. The motion is otherwise denied.

IT IS FURTHER ORDERED denying Plaintiff's Motion for Leave to Submit Preliminary Response;

Motion to Stay Rule 11(c)(1)(A) Consideration Until After Ruling on Pending Rule 59 and 60 Motions and for Leave to Consolidate Plaintiff's Further Response to Rule 11(c)(1)(A) Motion with His Response to Defendant Judges' District Court Local Rule 2.20(b)(2) Memorandum. (Dkts. 29-1, 29-2, 29.3)

IT IS FURTHER ORDERED granting Plaintiff leave to file a response to Defendants' motion for award of attorneys' fees (Dkt. 26) no later than October 15, 1997. Defendants Rogers and Fields shall file their reply no later than October 21, 1997.

IT IS FURTHER ORDERED staying resolution of Defendants' motions for sanctions and attorneys' fees pending further order of the Court. (Dkt. 25 and 26)

DATED this 30 day of September, 1997.

/S/_____
Earl H. Carroll
United States District Judge

APPENDIX D:

Ariz. Rule of Civil Procedure 42(f)

Change of judge
(eff. 12/1/90,Superseded 12/1/96)

1. Change as a matter of right. (A) Nature of proceedings. In any action pending in a superior court, except an action pending in the Tax Court, each side is entitled as a matter of right to a change of one judge and of one court commissioner. Each action, whether single or consolidated, shall be treated as having only two sides. Whenever two or more parties on a side have adverse or hostile interests, the presiding judge may allow additional changes of judge as a matter of right but each side shall have the same number of such changes. A party wishing to exercise his right to change of judge shall file a "notice of Change of Judge." The notice may be signed by an attorney; it shall state the name of the judge to be changed; and it shall; neither specify grounds nor be accompanied by an affidavit, such as required by subsection f(2) of this rule, but it shall contain an avowal by the party filing the notice or by the attorney that that party has not previously been granted a change of judge as a matter of right in that case. A judge may honor an informal request for change of judge. When a judge does so, the judge shall enter upon the record the date of the request and the name of the party requesting change of judge. Such action shall constitute an exercise of the requesting party's right to change of judge. (B) Filing and Service. The notice shall be filed and copies served on the parties, the presiding judge and the court administrator, if any, in accordance with Rule 5, Arizona Rules of Civil Procedure. (C) Time. Failure to file a timely notice precludes

change of judge as a matter of right. A notice is timely if filed sixty (60) or more days before the date set for trial. Whenever an assignment is made which identifies the trial judge for the first time or which changes the trial judge within sixty (60) days of the date set for trial, a notice shall be timely filed as to the newly assigned judge if filed within ten (10) days after such new assignment and before trial commences. A notice of change of judge is ineffective if filed within three (3) days of a scheduled proceeding unless the parties have received less than five (5) days notice of that proceeding. The filing of such an ineffective notice neither requires a change of judge nor precludes the party who filed it from subsequently filing a notice of change of judge that otherwise satisfies the requirements of this rule.

(D) Waiver. A party waives the right to change of judge as a matter of right when, after a judge is assigned to preside at trial or is otherwise permanently assigned to the action, the party agrees to the assignment or participates before that judge in:

i) Any scheduled contested matter in the case; or

ii) A scheduled pretrial hearing or conference; or

iii) The commencement of a trial.

Such waiver is to apply only to such assigned judge.

(E) Cases Remanded from Appellate Courts (not applicable to case from which certiorari sought)

(F) Assignment of Action(not applicable to case from which certiorari sought)

(2) Proceedings based on Cause (not applicable to case from which certiorari sought)

(3) Duty of Judge after Filing of Notice of Affidavit. When a notice or an affidavit for change of judge is timely filed, the judge named in the notice or affidavit shall proceed no further in the action except to make such temporary orders as may be absolutely necessary to prevent immediate and irreparable injury, loss or damage from occurring before the action can be transferred to another judge. However, if the named judge is the only judge in the county where the action is pending, that judge shall also perform the functions *of the presiding judge*.